



Home Care Association of New York State

Comments and Recommendations on the Certificate of Need Process

Provided to the New York State Hospital Review and Planning Council

Presented by Al Cardillo, Executive Vice President

July 23, 2008

The Home Care Association of New York State (HCA) is pleased to provide comments and recommendations to the State Hospital Review and Planning Council (SHRPC) and Department of Health regarding the state's interest in examining and reforming the Certificate of Need (CON) process.

HCA is comprised of over 400 health care providers, allied organizations and individuals involved in the provision of home and community-based services across New York State. HCA's provider members represent the full array of home care services and agencies in the state, including Certified Home Health Agencies (CHHAs), Long Term Home Health Care Programs (LTHHCPs), Licensed Home Care Services Agencies (LHCSAs), Managed Long Term Care (MLTC) plans, Hospice providers and AIDS Home Care Programs (AHCPs). HCA's mission is to promote and enhance the quality, accessibility and availability of home care in the state by assisting these provider members to meet the needs of the individuals and communities they serve.

Introduction

The CON process is unquestionably critical to and intertwined with the state's framework for health care policy, financing and state/local system operation. The implications of this reform inquiry, and any changes instituted in response, may be significant for all stakeholders, most importantly the consumers. HCA appreciates the importance, potential opportunities and possible consequences of this effort.

As you conduct this inquiry into CON, we feel it is important to emphasize that home care services are distinct from other categories of service for which CON is applied, particularly in that our agencies' services are not facility-based but are delivered in patients' homes and in the community. The service capacity of home care agencies – and hence the local supply of services relative to need and demand – is not tied to bricks and mortar, beds or facility size. Rather, home care service capacity is tied to the staffing and resources available to the agency, as well as to the characteristics, strengths and challenges of the service delivery environment – be it geography, community, culture, the local health system, or the characteristics of the patient's own home and social environment, to name just a few of the factors influencing home care delivery. Home care is also distinct in that it is one of the primary areas targeted by state policymakers for a positive shift in health system emphasis. Home care is the ultimate model in service delivery flexibility – it can grow or contract in accordance with need and resources, and without need for construction or demolition in response to need fluctuations. However, investment in and responsive state support of this system through CON and a positive policy framework is imperative to home care providers' ability to function and to adequately meet state and local health system goals.

We commend the Council and the State Health Department for examining the CON process and recognize that you are assessing a broad range of issues and questions in the course of this inquiry. We are continuing to analyze these issues and questions, and expect to supplement our comments to you today

with still further input from our membership. At this time, we will offer comments and recommendations on several priority concerns.

These comments today will address the following subjects:

- I. Streamlining the entire CON process; begin with targeted/priority areas
- II. Assignment and expansion of patient capacity in the Long Term Home Health Care Program
- III. CON review in cases of merger, consolidation, closure of home care
- IV. Compatibility of CON review with Berger Commission recommendations
- V. CON review of creative proposals to improve quality and/or access, and/or reduce cost
- VI. Consideration and management of the impact of new models of care on the existing system
- VII. Change state policies to allow for collaboration and enhanced special needs care
- VIII. Consideration of health workforce issues and other infrastructure needs
- IX. Importance of local input

I. Streamline the entire CON process; begin with targeted/priority areas

Our first concern and comment is global with respect to CON. The current CON process imposes layers of review, cost-thresholds between administrative and full review and other elements which complicate and delay the process, with consequences for the Department of Health, SHRPC, the applicant, the community and ultimately the patient beneficiaries of the proposed project. Concerns and ideas related to CON streamlining and reform are described throughout the ensuing sections of this document. In addition to these comments, concerns ranging from broader state policies encouraging the shift to home and community-based care, to the importance of an adequate infrastructure to ensure an effective response in emergency/disaster preparedness, compel adoption of a streamlined and reformed

CON. Responsiveness to large rural areas or other under- or unserved regions of the state exemplify additional instances where streamlining should be instituted.

HCA recommends that the steps, requirements and thresholds within the CON process be completely and carefully reevaluated for streamlining opportunities and the associated benefits, including: reduced administrative burden at all levels; reduced cost; reduced and enforced timeframes for decisionmaking; and, increased responsiveness to the providers, the health system and most importantly to the patients. These opportunities could begin with targeted areas as identified throughout this document. Such reforms would ensure improved accountability to the public.

II. Assignment and Expansion of Patient Capacity in the LTHHCP

This next issue area is both broad and technical and relates to the state's Long Term Home Health Care Program. LTHHCP providers are the only statewide home and community-based services providers that are restricted to assigned patient census limits – or “slots” – as part of their CON. These providers are approved and certified to enroll up to a specified number of patients at any given time, analogous to the assignment of beds to a facility. This element of the LTHHCP has its roots in the underlying statute enacted some thirty years ago when the system was in its developmental phase and the policy of prioritizing alternatives to institutional care was only just beginning to take shape. Even though other providers within the broader home and community-based service system – e.g., CHHAs, personal care, MLTCs and LHCSAs – which since that time have evolved along with the LTHHCP, have no limits on patient census, the Department requires LTHHCP providers, in addition to their initial CONs, to submit yet a further CON application for approval to expand their capacity limit. Still further is a Departmental requirement that a provider's application for a capacity expansion not be considered until at a minimum the census for all the LTHHCPs in the provider's county reaches 85% of the combined LTHHCP capacity in that same

county. For purposes of provider operations and patient access, HCA seeks relief from these excessive mandates.

Regrettably, HCA is aware of LTHHCP providers that, after 4 years, are still awaiting CON review for a capacity expansion. Given the length of the review and approval process, and absent flexibility and efficiency in it, a provider's ability to serve additional patients is unreasonably restricted, or at worst at a standstill. Historically, the Department has allowed LTHHCP providers to carry a census of up to 10% over their stipulated capacity limit, but this small margin is generally reserved to preserve access for patients who are discharged to hospitals or other settings in anticipation of a potential return to the LTHHCP. These state policies are certainly inadequate in a Berger Commission/system restructuring environment, as well as in consideration of the *Olmstead* Supreme Court directive to serve individuals in the least restrictive environment appropriate to their needs.

In this regard, HCA recommends at least the following:

1. Eliminate the need for LTHHCP capacity expansion applications to be submitted for full CON review; DOH should perform an administrative review of the expansion, which should be streamlined and subject to strict review deadlines.

2. Allow flexibility for a temporary 25% increase in capacity, or an increase of 25 patients, whichever is greater, while a capacity expansion review is pending. A proposal of this type was introduced this year by Senate Health Committee Chairman Kemp Hannon as part of a LTHHCP enhancement bill, S.8092 of 2008. HCA believes that this proposal could also be instituted by the Health Department as an expansion of their current 10% flexibility margin.

3. Reevaluate the justification for fixed capacity limits on LTHHCPs, given that no other providers of home and community-based services – CHHAs, MLTCs, LHCSAs or county-run Personal Care Programs – are subject to such limits.

4. HCA recommends elimination of the 85% requirement. The Department's requirement that the LTHHCP census in the county be at 85% of capacity before the Department will consider a capacity increase for any one provider serving that county is extremely problematic and regressive. It is limiting to patient access, freedom of choice and provider growth in counties where there are multiple providers, one or more of which has reached capacity first. This Departmental practice continues to cause years of delay in the processing of capacity increases for some providers. It is damaging to the provider's position in the local referral system and marketplace, artificially limits the growth of a successful program, confuses consumers and discharge planners, and sends the wrong policy signal . . . to fill up capacity on an aggregate basis rather than prioritize targeted enrollment.

III. CON review in cases of merger, consolidation, home care agency closure

Health care providers generally, and the home care agencies specifically, are undergoing change with respect to increasing merger, consolidation and closure. Publicly-sponsored home care agencies and programs have particularly been the subject of such activity.

In any such case, the changing and remaining home care agencies need to be able to adapt to ensure the stability of the home care system in the planning area. HCA recommends that the state review process be structured to accommodate, as necessary, the streamlining of the approvals of such mergers, consolidations, closures and/or consequent expansions in home care services to ensure that the community's needs are met without gap or interruption. Existing CHHAs and LTHHCPs should be able

to rapidly respond to adjacent county decertification plans. HCA recommends due scrutiny of proposed closures/consolidations as well as efforts to ensure that, prior to closure/consolidation, every effort is undertaken by the state to support and assure the stabilization and continuation of the provider where such provider's continuation is beneficial to the service continuum and care of patients in the given community.

IV. Compatibility of CON review with Berger Commission recommendations

Most of the Berger Commission recommendations, and indeed most other active state policies encouraging or directing system restructuring, are predicated on the existence, creation and/or expansion of home and community-based service capacity to appropriately and cost-effectively meet the community's needs in the wake of institutional reconfiguration or downsizing. The CON process must be compatible with respect to flexibility of public need measures and the ability to streamline state approvals, where appropriate and with due scrutiny, in order to ensure the viability and integrity of these restructuring policies and actions. HCA recommends that such CON flexibility and streamlining be instituted to address home care access and capacity in areas affected by Berger Commission or like recommendations.

V. CON review of creative proposals to improve quality and/or access, and/or reduce cost

HCA believes that provider innovation which improves quality and/or access, and/or reduces costs to taxpayers and consumers is of compelling state interest and merits state/SHRPC support through the CON process.

HCA recommends a streamlined application process for any such CON, including expedited administrative reviews. If such a project, particularly a consolidation to reduce costs or increase efficiency, will have a significant impact on total market share, a more deliberative and extensive review would be retained.

VI. Consideration and management of the impact of new models of care on the existing system

New models of care are routinely being developed by the state and federal governments. HCA encourages innovation in the long term care field. However, implementation, development and siting of new models without regard to the use of or effect on the existing home care infrastructure can be destabilizing. These types of initiatives are those which are developed and sited outside the process otherwise applicable to all other providers, including public need. Risks associated with this practice include system fragmentation, excessive competition for resources (especially scarce personnel resources), duplication of service, market over-saturation, financial instability, and others.

HCA recommends that the impact of new models and the siting of such models be evaluated for impact on the existing infrastructure before such models are developed, approved and/or sited. Any move into a provider type that is already regulated by CON should go through the same CON consideration. HCA further recommends that the use of the existing home care infrastructure be first considered to avoid duplication of effort.

VII. Change state policies to allow for collaboration and enhanced special needs care

The Council specifically asked for input with respect to collaboration among providers and enhanced care of special needs patients. HCA would like SHPRC to be aware of the current Health Department policy which prohibits patients from accessing services from separate home and community based waivers/programs, when collaboration between providers is necessary to meet a patient's specialized needs. While the policy is in response to severe restrictions CMS has created that impedes such collaboration, CMS has advised HCA that it has no formal rule prohibiting such collaboration. HCA has been communicating with members of the New York Congressional Delegation and with CMS to urge a revision in this policy and has similarly encouraged and urged the state to do the same. Senator Hannon

has sought to address this issue in his legislation S.8092 which would require the Department of Health to establish protocols for program/provider collaboration in these cases.

The significance of this policy restriction is that it prevents the normal course of collaboration and networking which would be conducted in creating and carrying out integrated, interdisciplinary care planning for special needs patients. It forces patients to choose one program/provider or the other, when the collaborative arrangement best meets the patient's needs. As part of SHRPC's CON reform goals to prioritize the avoidance of duplicative services and encourage collaboration and service to special needs patients, HCA urges SHRPC to recommend a state policy change to permit programs/providers to efficiently work together on behalf of patients.

VIII. Consideration of workforce issues and other infrastructure needs

As the expansion of home and community based care is relied upon to fill gaps and meet the increasing needs for care, it is critical that the state consider the workforce and capital infrastructure needs of home care agencies to fulfill this demand. The state's current Medicaid reimbursement methodologies do not adequately or contemporaneously accommodate the need for investments in the infrastructure to address such demands.

Before acting on CON proposals for consolidating or contracting hospitals and nursing homes, the SHRPC and Department of Health should be required to evaluate the CHHA, LTHHCP, LHCSA and Hospice capacity to ensure that the community system is able to address the expected effects of such shifting demands on the home care system and, if not, to first take the necessary steps to secure the community-based system.

In order to otherwise properly position home care agencies to meet the growing needs for care throughout the state, the Department should also amend the reimbursement methodologies and take such other actions as necessary to help ensure adequate workforce and agency infrastructure. Legislative proposals A.8390-C and A8544 by Assembly Health Committee Chairman Richard Gottfried and S.5230-B and S5428-A by Senate Health Committee Chairman Kemp Hannon are examples of actions to consider in relation to home care agency infrastructure.

VIII. Importance of Local Input

Local input can of course be a pivotal consideration in the determination of the need and appropriateness of a health care service. Mechanisms to step up opportunities for local input could enhance the accuracy and thoroughness of the CON review process as well as determine the level of urgency in community need. As previously stated, we believe that local input is particularly important to filling gaps and otherwise implementing the recommendations of the Berger Commission. However, local input mechanisms must be carefully chosen and overseen in order to avoid both bottleneck and bias, which can result in counter-productive actions or recommendations. Assuming the appropriate framework, local input would be both necessary and meritorious.

HCA recommends that mechanisms to appropriately facilitate local input be carefully explored, and we offer our involvement and assistance in this effort.

HCA appreciates this opportunity to comment and provide recommendations to the Council and the Department of Health relating to some of our ideas and concerns for CON reform. We are continuing to vet the specific questions and areas of input sought by the Council and the Department with regard to this CON initiative and look forward to providing additional feedback. We are eager to further engage with you to improve New York's Certificate of Need system.

Thank you.